

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





# 76-1416

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
UNITED STATES OF AMERICA,

Appellee,

-v-

WILFREDO PAGAN,

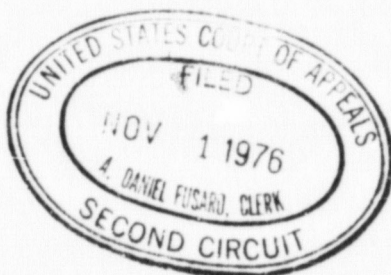
Appellant.  
-----X

B  
P/S

APPENDIX TO BRIEF FOR  
APPELLANT WILFREDO PAGAN

Appeal from A Judgment of  
Conviction in The United  
States District Court For  
The Southern District of  
New York

Donald E. Nawi, Esq.  
2 Park Avenue  
New York, New York 10016  
Attorney for Appellant  
Wilfredo Pagan



PAGINATION AS IN ORIGINAL COPY

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CRIMINAL DOCKET  
UNITED STATES DISTRICT COURT

Docket Entries A1

GRIESA, J 75 CRIM. 638

D. C. Form No. 100 Rev.

TITLE OF CASE  
THE UNITED STATES

ATTORNEYS

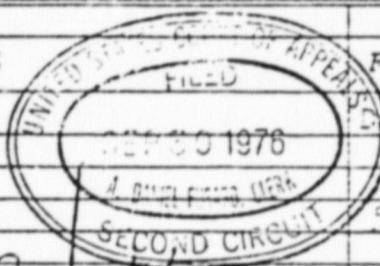
vs.

For U.S.:

1. CARLOS LOPERA-1&2
2. PEDRO CASTRO-1&2
3. WILFREDO PAGAN-1

Daniel J. Beller, AUSA.

791-1992



For Defendant:

(07) STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISC.
J.S. 2 mailed	Clerk				
J.S. 3 mailed	Marshal				
Violation	Docket fee				
Title 21					
Sec. 846, 812, 841(a)(1), (b).					
Consp. to viol. Fed. Narco. Laws. (Ct. 1)					
Distr. & possess. w/intent to distr.					
Cocaine, II. (Ct. 2)					
( Two Counts)					

DATE

PROCEEDINGS

- 6-27-75 Filed indictment.
- 6-30-75 Lopera (no atty. ) Court directs entry of not guilty plea thru interpreter Sylvia Aguilar. Deft. continued remanded in lieu of bail fixed by Mag. in the sum of \$50,000.  
Castro (atty. present) Pleads not guilty. Continued remanded in lieu of bail fixed by the Mag. in the sum of \$50,000.  
Case assigned to Judge Griesa for all purposes. Bail applications to be made before Judge Griesa July 2, 1975 at 10 A.M. Carter, J.
- 7-3-75 PEDRO CASTRO- Filed Notice of Appearance of Atty William Leibovitz, 51 E. 12nd St. N.Y.C., NY 10017. Tel # (212) 867-0160.
- 7-3-75 Deft's LOPERA & CASTRO (Atty's Present) W. Leibovitz for Castro and Irvin Hahn for Lopera. Motion to reduce Bail Granted as to both Deft's. LOPERA bail reduced to \$15,000. Cash or Surety. Castro bail reduced to \$10,000. P.R.R. secured by \$1,000. Both Deft's remain REMANDED in lieu of Bail. —GRIESA, J.

(Cont'd on Page #2)

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DATE	PROCEEDINGS
7-2-75	CARLOS LOPERA= No Atty present, Mr. Beller, A.D.S.A., requested new Atty be assigned. Magistrate to assign Attorney for LOPERA—GRIESA, J.
7-2-75	PEDRO CASTRO= Filed Appearance Bond for the sum of \$10,000 secured by \$1,000. Cash. Receipt #51451 - acknowledged by the Clerk.
7-15-75	LOPERA & CASTRO= Filed RETURN issued 7-3-75.
7-21-75	CARLOS LOPERA= Filed Deft's CJA-23 Financial Affidvt.
9-10-75	PEDRO CASTRO= Filed Deft's Affidvt & Notice of Motion for orders severing the charges against said Deft, and others as so indicated.
9-18-75	Conf. held, Atty's for all 3 Deft's present. B/W ordered for LOPERA. Bail limits extended to 7th for CASTRO only for Weekend.—GRIESA, J.
9-18-75	PEDRO CASTRO= Filed MEMO ENDORSEMENT on Deft's Notice of Motion & Affidvt for orders severing the charges against said Deft, filed 9-10-75. Motion DENIED without prejudice to renewal on points where no agreement can be reached. SO ORDERED—GRIESA, J. (m/n)
9-18-75	WILFREDO PAGAN= Filed Deft's Omnibus Motion Pursuant to Rule 16A & 16B, as so indicated with MEMO ENDORSEMENT ON SAME. Motion DENIED without prejudice to renewal on points where no agreement can be reached. SO ORDERED—GRIESA, J. (m/n)
9-21-75	B/W issued for Carlos Lopera
12-23-75	P. CASTRO - Filed notice of readiness for trial...
12-23-75	W. PAGAN - Filed notice of readiness for trial...
1-20-76	Filed bill of particulars...
2-4-76	PEDRO CASTRO - Atty. present... Withdraws plea of N/G and PLEADS GUILTY to count 1. P.S.I. ordered sentence date adj'd without date.. Bail cont'd... Griesa, J...
3-26-76	WILFREDO PAGAN - Filed memorandum of law and Statement of Facts... With memo endorsed... Motion denied... So ordered..... Griesa, J... m/n
3-30-76	W. PAGAN - Filed Govt's memorandum concerning admissibility of evidence..
3-30-76	W. PAGAN - Filed Govt's request for voir dire..
3-25-76	WILFREDO PAGAN - Jury trial begun.... Griesa, J.
3-26-76	Trial cont'd.
3-29-76	Trial cont'd.
3-30-76	Trial cont'd. & concluded.. Jury finds deft Guilty as charged on count 1. Sentence adjd to 9:30 May 14, 1976 P.S.I. ordered bail cont'd.... Griesa, J...
4-6-76	W. PAGAN - Filed Govt's requests to charge.
5-20-76	PEDRO CASTRO. Filed transcript of record of proceedings dated 2-4-76.
5-25-76	<del>PAGAN - Deft. (Atty. present) Jury Trial begun as to Pagan ONLY.</del> Deft. Pagan Plead N/G.

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DATE	PROCEEDINGS
5-24-76	Filed sentencing memorandum on behalf of deft. PEDRO CASTRO.
05-27-76	Deft. Castro & Atty present Def't Pagan not present. Sentences adj. to June 11, 1976 9:30 GRIESA, J.
6-11-76	LOPERA, CARLOS - Filed the following papers received from Mag. Jacobs, (Mag. No. 75-914) Docket entry sheet, Criminal Complaint, SDNY, Disposition Sheet, Appearance Bond in the sum of \$5,000.00 (PAB without security etc.) Temporary commitment and Notice of appearance of atty. Enid K. Gerling, 277 Broadway, NYC. WO 6-2145
6-11-76	CASTRO, PEDRO - Filed the following papers received from Mag. Jacobs, (Mag. No. 75-914) Docket entry sheet, Criminal Complaint, SDNY, Temporary commitment
6-11-76	PAGAN, WILFREDO - Filed the following papers received from Mag. Jacobs, (Mag. No. 75-914) Docket entry sheet, Criminal Complaint, SDNY, Disposition sheet, Appearance Bond in the sum of \$5,000.00 (PAB without security etc.) Temporary commitment and Notice of Appearance by atty. Enid K. Gerling, 277 Broadway, New York, NY WO 6-2145. and Irwin Klein, P.C. Two Park Ave. NYC 10016 683-0054.
6-11-76	PAGAN, WILFREDO - Filed Judgment (Atty. Stanley Fischer, present) the Defendant is committed for observation and study at an appropriate classification center or agency pursuant to Section 5010(e). Title 18, USC. Within sixty days from the date of the order, the Division shall report to the Court its findings. GRIESA, J entered on: 6-11-76.
6-11-76	CASTRO, PEDRO - Filed Judgment (Atty. William Leibovits, present) The defendant is committed for imprisonment for a period of TWO YEARS. The execution of sentence is suspended and defendant is placed on probation for a period of FIVE YEARS. Count 2 is dismissed upon motion by defendant's counsel with the consent of the Government. The defendant is not to get involved in any enterprises involving liquor or narcotics. GRIESA, J Entered on: 6-11-76.
7-14-76	PAGAN, WILFREDO - Filed commitment & entered return. Deft delivered to MCC on 6-11-76
9-8-76	WILFREDO PAGAN - Filed Judgment (Atty. Stanley Fischer, present) having on June 11, 1976 been committed to the custody of the Atty. Gen. or his representative pursuant to Title 18, U.S.C. Sec. 3019(e) for study and report, the Court having now received and considered the report of such study, it is ordered and adjudged that the def't be sentenced to TWO YEARS IMPRISONMENT. Pursuant to Sec. 3651, Title 18, USC, execution of sentence is suspended and def't to be placed on Probation for a period of FIVE YEARS. GRIESA, J....Ent. 9-14-76-----
9-16-76	WILFREDO PAGAN - Filed notice of appeal from Judgment dated 9-8-76. Copy given to U.S. Atty. and mailed to def't 365 5th Ave. NYC C/O Stanley Fisher.....

6/28/76 Filed Transcripts of Proceedings dtd 7/2/76, 9/18/75, 5/27/76,  
6/11/76, 9/8/76

DJE:ayc

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

UNITED STATES OF AMERICA,

-v-

CARLOS LOPERA,  
PEDRO CASTRO and  
WILFREDO PAGAN

INDICTMENT

75 Cr. 638

Defendants .

The Grand Jury charges:

The Grand Jury charges:

1. From on or about the 1st day of May, 1975, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York,

CARLOS LOPEZ, PEDRO CASTRO  
and WILFREDO PAGAN

the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.



DJB:art

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

1. On or about May 25, 1975, in San Juan, Puerto Rico, CARLOS LOPERA had a telephone conversation with another person about the sale of 4 kilograms of cocaine.

2. On or about June 3, 1975, in San Juan, Puerto Rico, PEDRO CASTRO, had a conversation with another person about the sale of cocaine.

3. On June 17, 1975, PEDRO CASTRO flew from San Juan, Puerto Rico to New York, New York.

4. On or about June 18, 1975, in New York, New York, CARLOS LOPERA and PEDRO CASTRO delivered approximately an eighth of a kilogram of cocaine to another person.

5. On or about June 19, 1975, in New York, New York, WILFREDO PAGAN had a conversation on the telephone with another person.

6. On or about June 20, 1975, in New York, New York, CARLOS LOPERA, PEDRO CASTRO and WILFREDO PAGAN met at 22 Cornelia Street, New York, New York.

(Title 21, United States Code, Section 846.)



DJB:art

SECOND COUNT

The Grand Jury further charges:

On or about the 18th day of June, 1975,  
in the Southern District of New York,

CARLOS LOPEZ and PEDRO CASTRO

the defendants, unlawfully, intentionally and knowingly  
did distribute and possess with intent to distribute a  
Schedule I narcotic drug controlled substance, to wit,  
approximately 113 grams of cocaine.

(Title 21, United States Code, Sections 812,  
841(a)(1) and 841(b)(1)(A) and Section 2 of  
Title 18, United States Code.)

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FORLEMAN

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PAUL J. CORLEA  
United States Attorney

1 bslm 255

2 UNITED STATES OF AMERICA

3 vs.

75 Cr. 638

4 WILFREDO PAGAN

5 March 30, 1976  
6 9:45 a.m.

7 (In open court; jury present.)

8 CHARGE OF THE COURT

9  
10 THE COURT: Ladies and gentlemen, you, as the  
11 jury, are about to enter on your final functions in the  
12 case. You are performing what is really a sacred  
13 obligation of citizenship, in sitting in this case.

14 As I said at the beginning of the trial, you  
15 are obliged to perform your function in an attitude of  
16 complete fairness, impartiality, without the slightest  
17 bias or prejudice for or against the Government, for or  
18 against the defendant.

19 This case is clearly of great importance to  
20 the Government, since the enforcement of the criminal laws  
21 of this country is a matter of high concern to the  
22 nation and to the community.

23 At the same time, the case is equally important  
24 to the defendant because of the obvious consequences of  
25 conviction for a crime. So what you are performing is



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a very important task to all sides.

I am not saying this to say a platitude. I am saying this to make sure you understand that you are obligated to work hard and conscientiously at this case, which I know you understand already.

The fact that the United States Government is a party to this action entitles it to no greater consideration than the consideration owed to a defendant. By the same token, the Government is entitled to no less consideration.

In fact, both the Government and the defendant are equals in this court, which is a court of justice to all parties.

Your final role is to decide and to pass upon the facts, the issues of fact. You, the jury, are the sole and exclusive judges of the facts. You pass upon the weight to be given to different portions of the evidence. You determine the credibility of the witnesses. You resolve the conflicts in the evidence. You determine what inferences can properly be drawn from one piece of evidence with respect to some factual question you are considering

My function as the Court is to instruct you on the law, and it is your duty to accept these instructions

1 bslm 257

2 on the law whether you may agree with them or not. And then  
3 it is your duty to apply the rules of law to the evidence  
4 and arrive at a verdict at the conclusion of your delibera-  
5 tions.

6 With respect to any matters of fact, it is your  
7 recollection of the evidence that governs. Each of the  
8 attorneys has given you his summation as to what he  
9 contends has or has not been proved in the evidence, but  
10 the summations are not in themselves evidence and are  
11 not to be substituted for your recollection of the evidence.

12 As I described to you earlier, and I am sure  
13 you recognize clearly by now, the evidence consists of  
14 the testimony admitted into evidence, the exhibits admitted  
15 into evidence, and any stipulations which have been  
16 agreed upon.

17 The fact that rulings have been made by me during  
18 the trial on procedural matters, or on matters of evidence,  
19 or on other matters of law, the fact that occasionally  
20 questions have been asked by me or remarks of any kind  
21 have been made by me, none of these things should be  
22 taken in any way to indicate any view of mine as to what  
23 your verdict should be. Nothing whatever in these instruc-  
24 tions should be taken by you as an indication of what your  
25 verdict should be.



1 bslm 258

2 My role is to instruct you on the rules of law  
3 and your role is the role of finding the facts and reach-  
4 ing the ultimate verdict. Just as I know you respect  
5 my role as the Court, I thoroughly respect yours and have  
6 no intention of treading upon it.

7 You will have a copy of the indictment in the  
8 jury room during your deliberations. As you know, the  
9 indictment names as defendants not only Wilfredo Pagan  
10 but also Pedro Castro and Carlos Lopera. Of course, only  
11 the Defendant Pagan is now on trial before you. The  
12 question of whether all persons named as defendants in  
13 an indictment should be tried together in the same trial  
14 or tried separately in separate trials, these are procedural  
15 matters which are of no concern to the jury. The fact  
16 that the case against Pagan has been separated from the  
17 case against Castro and Lopera for trial is not to enter  
18 into your deliberations or play any part whatever in  
19 your considerations. You may draw no inference whatever,  
20 either for or against Pagan, from the fact that the trial  
21 as to Castro and Lopera has been severed or separated.

22 I am about to describe to you the elements  
23 which the Government must prove beyond a reasonable doubt  
24 in order to convict the Defendant Pagan. Since you have  
25 heard in this case a great deal of evidence about Castro

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2 and Lopera, I must caution you to bear in mind that it is  
3 only Pagan who is on trial before you. You must determine  
4 whether the Government has proved the commission of criminal  
5 acts by Pagan and the necessary criminal intent on the  
6 part of Pagan. Obviously, it is not sufficient for the  
7 Government, in order to convict Pagan, to show criminal  
8 acts or criminal intent merely on the part of Castro and  
9 Lopera.

10 In a court of law, there is no guilt simply by  
11 association. The Government must prove its case completely  
12 and individually against Pagan in order for him to be  
13 convicted of any crime.

14 You are, of course, entitled and indeed obligated  
15 to consider all the relevant evidence and circumstances in  
16 determining the question of guilt or innocence as to Pagan.  
17 Included in this evidence, and included in such circum-  
18 stances, you will consider evidence about transactions  
19 involving Lopera and Castro, but you will consider this  
20 evidence solely on the question of what inferences can  
21 or cannot be drawn as to the guilt or innocence of Pagan.

22 The indictment charges the defendant with viola-  
23 tion of the federal narcotics laws. Let me describe for  
24 you the statutory provisions with which we are concerned.  
25 These provisions are contained in what is known as the



bslr. 260

Comprehensive Drug Abuse Prevention Act of 1970, passed by the Congress. The Congress enacted this statute as part of its concern with the illegal importation and distribution of narcotic drugs.

Title 21 of the United States Code, in Section 841, makes it unlawful for a person to knowingly or intentionally distribute or possess with intent to distribute what is called a "controlled substance."

When you look at the indictment, you will see reference to Section 841, and you will see reference to this phrase, "controlled substance."

Title 21, United States Code, in Section 812 has a list of controlled substances in two schedules: Schedules 1 and 2. Again, you will see in the indictment a reference to Section 812 and you will see a reference to the phrase "Schedule 1 and 2."

Now, cocaine is a controlled substance included in Schedule 2, so if you put these two statutory provisions together, Sections 841 and 812, the total effect is to make it illegal to distribute or possess with intent to distribute, knowingly and intentionally, the narcotic cocaine.

A third section of the statute which I need to describe to you is Section 846. This section makes it a separate crime for two or more persons to conspire to

1 bslm 261

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2 violate any other provision of the statute.

3 In this indictment the Defendant Pagan is charged  
4 with conspiracy, with conspiring along with Lopera and  
5 Castro and others, to distribute cocaine.

6 I told you at the beginning of the trial, and  
7 I will repeat again now, the indictment is merely an  
8 accusation. It is a charge. It is no evidence or proof  
9 of guilt. No weight whatever is to be given by you to the  
10 mere fact that an indictment has been returned against  
11 the defendant.

12 It is the evidence in the trial that matters  
13 and the evidence alone.

14 The defendant has pleaded "Not guilty," which  
15 means that the Government has the burden of proving the  
16 charges against him beyond a reasonable doubt. A defendant  
17 does not have to prove his innocence; he is in fact presumed  
18 to be innocent of the accusations contained in the  
19 indictment. This presumption of innocence was in his  
20 favor at the start of the trial; it is in his favor as  
21 I instruct you now, and it remains in his favor during  
22 your deliberations in the jury room. It is removed only  
23 if and when you are satisfied that the Government has  
24 sustained its burden of proving the guilt of the defendant  
25 beyond a reasonable doubt.



bslm 262

What do we mean by "reasonable doubt"? A reasonable doubt is a doubt founded in reason, arising out of the evidence or lack of evidence. It is a doubt which a reasonable person has after carefully weighing all the evidence. It is a doubt which appeals to your judgment, your common sense, your experience; but all of this is in contrast to some things which it is not. It is not caprice, whim, speculation, mere suspicion. That is not a reasonable doubt. It is not sympathy, a desire to avoid an unpleasant duty, mere personal feeling -- that kind of thing. The key word again is "reasonable."

If, after a fair and impartial consideration of all the evidence, you say that you are not satisfied as to the guilt of the defendant, if you have a doubt which would cause you, as prudent persons, to hesitate before acting in matters of importance to yourselves, then you have a reasonable doubt; and in that circumstance, it is your duty to acquit, to return a verdict of "Not guilty."

On the other hand, if, after a consideration of all the evidence, you candidly and honestly say you do have an abiding conviction of a defendant's guilt, such a conviction as you would be willing to act upon in important matters in your own lives, then you can say that you have no reasonable doubt; and under those circumstances it is

1 bslm 263

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2 your duty to convict.

3 One final word on this subject: Proof beyond  
4 a reasonable doubt does not mean proof to a positive  
5 certainty or beyond all possible doubt. If that were the  
6 rule, you see, few persons however guilty, would ever be  
7 convicted. It is practically impossible for any of us to  
8 be absolutely and completely convinced of any controverted  
9 fact unless possibly in the realm of mathematics or some-  
10 thing like that, so the law in a criminal case is that  
11 it is sufficient if the guilt of a defendant is established  
12 beyond a reasonable doubt, but not beyond every possible  
13 doubt.

14 Let me now turn to the indictment, and for  
15 purposes of background, I will read it to you.

16 The grand jury charges:

17 "One. From on or about the first day of May,  
18 1975, and continuously thereafter up to and including the  
19 date of the filing of this indictment, in the Southern  
20 District of New York, Carlos Lopera, Pedro Castro and  
21 Wilfredo Pagan, the defendants, and others to the grand  
22 jury unknown, unlawfully, intentionally and knowingly  
23 combined, conspired, confederated and agreed together with  
24 each other, to violate Sections 81, 841(a)(1) and 841(b)(1)  
25 of Title 21, United States Code.

"Two. It was part of said conspiracy that the



1 bslm 264

2 said defendants unlawfully, intentionally and knowingly  
3 would distribute and possess with intent to distribute  
4 Schedule 1 and 2 narcotic drug controlled substances, the  
5 exact amount thereof being to the grand jury unknown, in  
6 violation of those same statutory provisions."

7 Then there is a section of the indictment called  
8 "Overt Acts," and I will explain that in a minute, but  
9 let me read the section of the indictment.

10 "In pursuance of the said conspiracy, and to  
11 effect the objects thereof, the following overt acts were  
12 committed in the Southern District of New York and else-  
13 where:

14 "One. On or about May 25, 1975, in San Juan,  
15 Puerto Rico, Carlos Lopera had a telephone conversation  
16 with another person about the sale of four kilograms of  
17 cocaine.

18 "Two. On or about June 3, 1975, in San Juan,  
19 Puerto Rico, Pedro Castro had a conversation with another  
20 person about the sale of cocaine.

21 "Three. On June 17, 1975, Pedro Castro flew  
22 from San Juan, Puerto Rico to New York, New York.

23 "Four. On or about June 18, 1975 in New York,  
24 New York, Carlos Lopera and Pedro Castro delivered  
25 approximately an eighth-of-a-kilogram of cocaine to

1 bslm 265

2 another person.

3 "Five. On or about June 19, 1975 in New York,  
4 New York, Wilfredo Pagan had a conversation on the telephone  
5 with another person.

6 "Six. On or about June 20, 1975 in New York,  
7 New York, Carlos Lopera, Pedro Castro and Wilfredo Pagan  
8 met at 22 Cornelia Street, New York, New York."

9 You will notice that when I read the first  
10 paragraph of the indictment, it charged a conspiracy  
11 from on or about May 1st, 1975 up to the date of the  
12 indictment, which was June 27, 1975, and it charged that  
13 the conspiracy occurred in the Southern District of New  
14 York. The Southern District of New York includes New  
15 York City and the counties on either side of the Hudson  
16 up to Albany.

17 At the outset, I would state to you that if you  
18 find a conspiracy existed during some time referred to,  
19 during some of the time period, that is sufficient. I  
20 think that is apparent from the language. Furthermore,  
21 you have heard evidence about certain transactions in  
22 Puerto Rico, and I instruct you that if you find that acts  
23 pursuant to the conspiracy, or the alleged conspiracy by  
24 the conspirators occurred in the Southern District of  
25 New York, it does not defeat the indictment that other acts



1 bslm 266

2 occurred in Puerto Rico or elsewhere.

3 I should state in general that a conspiracy is  
4 regarded in the law as involving collective or organized  
5 action and therefore as presenting a greater potential  
6 threat to the public interest than illegal activity by a  
7 single individual. Group activity sometimes permits  
8 ends to be achieved which are more dangerous than those  
9 which can be achieved by a single individual. Also,  
10 the joint activity of two or more persons may make detection  
11 of crime more difficult than in the instance of a single  
12 lone wrongdoer. That is why the Congress has made con-  
13 spiracy, or concerted action to violate the law a separate  
14 crime.

15 In order to convict the Defendant Pagan of the  
16 crime of conspiracy charged in the indictment, you must  
17 find that the following essential elements are established  
18 by the evidence beyond a reasonable doubt. I am going to  
19 list the three such elements, and I repeat, you must find  
20 that each of these three elements is established beyond a  
21 reasonable doubt:

22 The first element you must find is that there  
23 was a conspiracy among some two or more persons, as  
24 alleged in the indictment; that is, a conspiracy to dis-  
25 tribute cocaine.

1 bslm 267

2 The indictment has the somewhat complicated  
3 language about distributing and possessing with intent to  
4 distribute, but for present purposes we can simply concen-  
5 trate on the language "distribution." The Government  
6 here charges a conspiracy to distribute cocaine, so we  
7 won't worry with the other elaboration of language.

8 So the first element that must be proved is  
9 that there was a conspiracy among two or more persons  
10 as alleged in the indictment; that is, a conspiracy to  
11 distribute cocaine.

12 The second element which must be proved in order  
13 to convict Pagan is that Pagan knowingly and willfully  
14 became a member of this alleged conspiracy.

15 The third element that must be proved is that  
16 one or at least one of the alleged conspirators committed  
17 at least one of the overt acts set forth in the indictment.

18 Again, I will return to the subject of overt  
19 acts in a moment.

20 With respect to the first element, the need for  
21 proof of the existence of the conspiracy, let me give you  
22 a certain explanation. The gist of the crime of conspiracy  
23 is an unlawful agreement to violate the law. Whether or  
24 not conspirators actually accomplish what it is they agree  
25 to do is immaterial to the question of their innocence or



1 bslm 268

2 guilt with respect to the crime of conspiracy. The gist  
3 of the crime of conspiracy is the unlawful agreement to  
4 violate the law.

5 A conspiracy has sometimes been called "a partner-  
6 ship in crime." This means that each member becomes a  
7 kind of agent for every other member in connection with  
8 the conspiracy.

9 To establish a conspiracy involving the making  
10 of an agreement to violate the law, the Government is not  
11 required to show by direct evidence the actual making of  
12 the full agreement. It would be rare, indeed, that there  
13 would be evidence showing that conspirators sat and spelled  
14 out among each other the complete terms of an agreement  
15 to violate the law. Your common sense will tell you that  
16 when in fact persons undertake to enter into a criminal  
17 conspiracy, much is left to the unexpressed understanding.

18 From its very nature, a conspiracy is almost  
19 invariably secret in its origin and in its execution  
20 to the extent possible.

21 It is sufficient if two or more persons in any  
22 manner through any contrivance, impliedly or tacitly, come  
23 to a common understanding to violate the law. In determin-  
24 ing whether there has been an unlawful agreement, you may  
25 judge acts or conduct of the alleged conspirators which

1       bslm 269  
2       are done to carry out an apparent criminal purpose. The  
3       old adage, "Actions speak louder than words," is applicable  
4       here.

5               Usually, the only evidence of a conspiratorial  
6       agreement is that of disconnected acts, conduct and  
7       declarations of the co-conspirators. However, a conspiracy  
8       is proved if, when taken together in connection with each  
9       other, these acts and declarations, even if disjointed,  
10      lead to the conclusion that there is a conspiracy to  
11      obtain a particular criminal result.

12             I should note that the fact that certain proposed  
13      narcotics transactions are alleged in this case to have  
14      been negotiated with undercover agents of the United States  
15      Government. This is not a defense so long as you find that  
16      there was an agreement among two or more of the defendants  
17      to sell cocaine or attempt to sell cocaine.

18             With respect to the second element, that is,  
19      the question of the membership of the Defendant Pagan in  
20      the conspiracy, I will instruct you as follows:

21             If you do conclude that a conspiracy existed, you  
22      must next determine whether the Defendant Pagan was a  
23      member of that conspiracy. In order to do so, you must  
24      find proven beyond a reasonable doubt that Pagan partici-  
25      pated in the conspiracy in some way with knowledge of its



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2 unlawful purpose and with intent to further the unlawful  
3 objectives.

4 I should instruct you that mere knowledge by the  
5 defendant of the existence of conspiracy by others, or  
6 mere association of the defendant with persons who are  
7 conspirators, none of this is sufficient to establish member-  
8 ship by Pagan in the conspiracy.

9 By the same token, if a defendant takes some  
10 action which happens to further a conspiracy, but doesn't  
11 know about the conspiracy -- for instance, if he has some-  
12 thing on his person and doesn't know what it is, something  
13 like that -- that mere action without the knowledge is  
14 not sufficient to convict someone of being a member of  
15 the conspiracy.

16 So these elements must be proved as to Pagan;  
17 that is: Participation in some way in the conspiracy;  
18 knowledge by Pagan of the illegal purpose of the conspiracy,  
19 that is, to obtain and distribute cocaine; and an intent by  
20 Pagan to further the objects of the conspiracy. Both the  
21 guilty acts and the guilty state of mind must be proved  
22 before Pagan can be convicted of being a member of the  
23 conspiracy.

24 In determining whether the Defendant Pagan was  
25 a member of the conspiracy, you may consider all of the

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2 evidence before you, including the acts and declarations  
3 of any member of such conspiracy, in or out of the defend-  
4 ant's presence, so long as such acts or declarations were  
5 done in furtherance of the conspiratorial objectives.

6 In other words, you are permitted to consider all  
7 of the evidence which you believe reasonably relates and  
8 has reasonably probative value on the issues before you.

9 I think I expressed to you certain terms about  
10 the need for proof with respect to state of mind. I've  
11 told you that you have to -- in order to convict Pagan  
12 you have to find specific knowledge by him that this was  
13 a cocaine transaction, and intent to further that cocaine  
14 conspiracy -- the alleged cocaine conspiracy.

15 I think the meaning of those words in the con-  
16 text of this case is abundantly clear, but just so there  
17 is no misunderstanding, you should understand that willfull-  
18 ness and intent in this context, and the knowledge of the  
19 cocaine transaction, is in contrast to some accident, some  
20 situation where someone is involved accidentally, innocently  
21 doesn't know the purposes, and so forth. I think that  
22 is abundantly clear.

23 Now, I should instruct you with respect to mem-  
24 bership that the guilt of a conspirator is not governed  
25 by the extent or duration of his participation in the



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2 conspiracy, or whether he has knowledge of all of the  
3 operations of the conspiracy. Even if someone joins a  
4 conspiracy after it is formed, and is engaged in it to  
5 a degree more limited than that of other conspirators,  
6 he is criminally liable so long as he is a co-conspirator.  
7 Each member of a conspiracy may perform separate and  
8 distinct acts at different times and in different places.

9 Some conspirators may play major roles while  
10 others play minor roles. As long as you find membership  
11 as defined by me a minute ago, that is sufficient for  
12 conviction of membership in a conspiracy, even if the role  
13 played by the individual is a minor role, so long as  
14 there is participation in some way to further the objects of  
15 the conspiracy.

16 I have referred twice to this concept of overt  
17 acts. Assuming that you have found a conspiracy to have  
18 existed and you find that the defendant on trial before  
19 you was a member of that conspiracy, you must still find  
20 an additional element proved beyond a reasonable doubt,  
21 You must find, in order to convict, that at least one  
22 of the conspirators committed at least one of the overt  
23 acts alleged in the indictment in the Southern District  
24 of New York at or about the time alleged in the indict-  
25 ment, and that such act was committed in furtherance of

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2 the conspiracy.

3 An overt act is any step or action or conduct  
4 which is taken to achieve or accomplish or further the  
5 objective of the conspiracy. The purpose of requiring  
6 proof of an overt act is that while parties might agree  
7 to violate the law, they may change their minds before  
8 any objective act is done to effect the object of the  
9 conspiracy. In this event, the law is that the crime of  
10 conspiracy is not committed. Some objective act by some-  
11 one of the conspirators must be performed.

12 This objective or overt act need not be a  
13 criminal act in and of itself. It simply needs to be  
14 some objective step taken to further the object of the  
15 conspiracy.

16 It is not necessary for the Government to prove  
17 that each member of the conspiracy, or even the defendant  
18 himself, committed or participated in the overt act. It  
19 is sufficient if one of the conspirators commits one of  
20 the overt acts alleged in the indictment; that is, one out  
21 of the six overt acts. If you find one of those six  
22 committed by one of the defendants, this is sufficient.

23 Furthermore, the exact time referred to in the  
24 statement of the overt acts need not be proven as long as  
25 the overt act is proven to have been done at the approximate



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2 time referred to.

3           You have heard testimony that during February,  
4 1974 the defendant engaged in transactions involving  
5 possession and sale of cocaine. I remind you, as I stated  
6 before during the trial, that the defendant is not on  
7 trial before you with respect to any such 1974 drug trans-  
8 actions. You must be careful not to draw some general  
9 inference that because the defendant may have committed  
10 cocaine transactions back in February, 1974 he is somehow  
11 in some general way guilty of cocaine transactions in  
12 June of -- June or so of 1975.

13           The Government did not put the evidence about  
14 the 1974 transactions on with any such general purpose,  
15 nor did I permit it to be put on for any such general  
16 purpose, nor can you consider it in any such way. The  
17 sole relevance, if any, with respect to the 1974 trans-  
18 actions, or evidence thereof, is on the question of the  
19 defendant's state of mind at the time of the alleged 1975  
20 transactions.

21           In other words, if you have a question about  
22 whether the defendant had the requisite guilty state of  
23 mind, and you are questioning whether he was present by  
24 some mistake or whether he knew the language of the trade,  
25 or if you have some other question about his state of mind,

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2 you may, and you are permitted to use the evidence about  
3 the 1974 transactions, to the extent you believe it  
4 logically relates and assists you in determining whether  
5 he had the requisite guilty state of mind, or was acting,  
6 on the other hand, on the basis of a mistake or for some  
7 other innocent reason.

8 That concludes my description of the elements to  
9 be proved, and I will now give you some general observa-  
10 tions and some specific observations about different  
11 phases of the evidence, other phases of the evidence.

12 There has been testimony before you with respect  
13 to the use by the narcotics agents of the services of an  
14 informer, Brenda Marchand. The informer herself has  
15 testified. Whatever one thinks of informers, the Govern-  
16 ment lawfully uses them in order to obtain information  
17 about those who are violating the law. You will consider  
18 the testimony of Mrs. Marchand along with all the other  
19 evidence, to determine whether the Government has proved  
20 beyond a reasonable doubt that the Defendant Pagan violated  
21 the law. I will instruct you in a few minutes about  
22 determining the credibility of witnesses, all the witnesses  
23 in the case.

24 I think at this point I might describe to you  
25 the difference between two types of evidence, direct evidence



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2       and circumstantial evidence, because in this case, as in  
3       most cases, both types of evidence are present and relied  
4       upon.

5               Direct evidence means basically the testimony of  
6       an eyewitness. Someone says that he saw something; he  
7       heard something, or a document may say that something was  
8       done. This is direct evidence.

9               What is circumstantial evidence? Circumstantial  
10       evidence is where one fact, or perhaps a chain of facts,  
11       gives rise to a reasonable inference of another fact.

12              Let me give you an example which has nothing  
13       at all to do with the case, but it may illustrate some-  
14       thing for you:

15              Suppose I see fire engines converging on a  
16       building with all their sirens going. Then I see the  
17       engines immediately leave after a fireman has made a  
18       brief inspection; it is reasonable for me to infer that  
19       somebody turned in a false alarm. I don't have any direct  
20       evidence of this. In other words, I haven't seen the  
21       person pull the lever at the fire alarm, and I don't know  
22       what he had in his mind when he did it, but I can draw  
23       the reasonable inference from the set of circumstances  
24       observed by me that someone turned in a false alarm.

25              If one fact or a group of facts, on the basis of

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2 logic and common sense, leads you logically and reasonably  
3 to infer other facts, then this is circumstantial evidence,  
4 and it is of no less value than direct evidence.

5 One place this comes into play in criminal  
6 cases is on the question of state of mind. There is no  
7 way to actually look into somebody's mind; there is no  
8 machine there recording what is going on in somebody's  
9 state of mind -- and state of mind is usually, or often,  
10 discerned or proven or determined by actions, circumstances  
11 from which, in the realm of common sense, a particular  
12 state of mind can reasonably be inferred.

13 Let's go to the question of credibility of  
14 witnesses. I described this to you, this matter to you  
15 at the beginning of the trial, and I will repeat instruc-  
16 tions on it now. It is for you jurors to determine the  
17 credibility of the witnesses. Credibility relates to  
18 two basic things: One, the honesty of the witness;  
19 second, even in the case of an honest witness, the question  
20 always has to be determined how good or accurate is their  
21 memory, their ability to express what occurred.

22 How do you evaluate the credibility of witnesses?  
23 Well, in the first place, you bring into the courtroom your  
24 everyday common sense, your good judgment, your experience.

25 The first thing you do is to consider the manner



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2 of the witness on the stand. You will consider your basic  
3 impression as to whether or not each witness was telling  
4 the truth, was giving you a candid and accurate version  
5 of what occurred or was doing otherwise.

6 In arriving at your basic judgment of the  
7 credibility of a witness, it is well to keep in mind that  
8 witnesses are human beings from a variety of walks of  
9 life and backgrounds. The ultimate question is not whether  
10 you have a personal like or dislike, or a personal respect  
11 or disrespect for the witness as a man or a woman. The  
12 final question as to each witness is whether, in view of  
13 all the circumstances, you believe that the witness has  
14 told you facts which you can rely on and which contribute  
15 to your knowledge of the factual picture of this case.

16 As I told you at the beginning of the trial,  
17 you will consider the manner, the demeanor, the appearance  
18 of the witnesses, but you will consider other things.

19 Do you want to take a stretch for a minute? Why  
20 don't you stand up and stretch. I want you all to be  
21 alert through all of this.

22 (Pause.)

23 But we all know that some people can be good  
24 actors. They can appear to be very candid but not in fact  
25 candid. On the other hand, some people who appear nervous

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2       and unsure can be the most honest people in the world. So  
3       you consider the appearance, the demeanor, but you consider  
4       it in balance and perspective with other things. That  
5       is true of your whole consideration of credibility and,  
6       indeed, of the whole case. Don't focus on one factor in  
7       isolation or one consideration. Broaden your considerations  
8       out to keep whatever you are thinking about in balance  
9       with other things you know about the case and other factors.

10               So, consider the manner; consider other things.  
11       Look at the substance of the testimony. See whether it  
12       makes sense or doesn't make sense. See how probable or  
13       improbable, plausible or implausible it is.

14               Also, you are entitled and indeed obligated to  
15       consider any evidence about inconsistent statements. You  
16       heard testimony in this case, and you have exhibits before  
17       you, with respect to the testimony of witnesses before  
18       you, and the question of whether they included or did not  
19       include certain items testified in reports that they made  
20       as Government agents. You will consider that type of  
21       evidence to determine whether there is inconsistency  
22       between what was said on the stand and what was written  
23       or said on a prior occasion.

24               Again, though, you are to consider those factors  
25       in balance and in perspective. You are to consider whether



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2 those alleged inconsistencies really indicate that the  
3 testimony in court was false or inaccurate or whether the  
4 alleged inconsistencies are explained by other reasons.

5 You will also consider whether any witness here  
6 has a motive for testifying falsely or a bias, some reason  
7 for testifying contrary to the fact. You've heard argu-  
8 ments by both counsel on that subject with respect to  
9 various witnesses, and I won't attempt to summarize or  
10 repeat those arguments.

11 In conclusion, as far as credibility is concerned,  
12 it is up to you in your good judgment to determine whether  
13 all the testimony of a witness is to be believed and  
14 credited, whether part of it is, or whether none of it  
15 is.

16 The law permits, although it does not require,  
17 a defendant to take the witness stand in his own behalf.  
18 In this case, the Defendant Pagan took the stand. Obviously,  
19 the defendant has a deep personal interest in the result of  
20 this prosecution. Indeed, it is fair to say that a  
21 defendant has the greatest stake in the outcome of the  
22 trial. Interest, as you know, may create a motive for  
23 testifying falsely. The greater the interest, the stronger  
24 the motive. And the defendant's interest in the result of  
25 a trial is of a character possessed by no other witness.

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2 In appraising the defendant's credibility, you  
3 are to take these -- you are entitled to give consideration  
4 to these factors. However, it by no means follows that  
5 simply because a person has a vital interest in the result  
6 of the case, he is not capable of telling a truthful and  
7 straightforward story. It is for you to decide to what  
8 extent the defendant, in view of all the circumstances,  
9 should be believed.

10 I repeat, it is for you to decide whether, to  
11 the extent to which the testimony of any witness should  
12 be believed; that is your responsibility.

13 There has been testimony that the Defendant Pagan,  
14 in testifying before the grand jury, made statements  
15 indicating his innocence. You will recall the testimony  
16 about him being on the fire escape. The Government contends  
17 and has introduced evidence to show, that this testimony  
18 before the grand jury was false. Mr. Pagan testified  
19 about the fire escape, his placement on the fire escape  
20 here at trial. Again, there is evidence introduced by the  
21 Government which the Government contends shows the falsity  
22 of that testimony of Pagan.

23 I'm not saying this to indicate any view of  
24 mine as to which testimony is true or which testimony is  
25 false. That is entirely up to you as the jury. I am



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2 simply charging you now on one point of law.

3 If you believe that the defendant made false  
4 testimony in order to exculpate himself, you are entitled,  
5 if you believe it logically follows, to view this as  
6 evidence of consciousness of guilt and circumstantial  
7 evidence of guilt.

8 Again, I am not saying that these conclusions  
9 should follow. I am simply saying that you are entitled  
10 to consider that aspect of the case, that question, and  
11 determine whether that is something which you should find  
12 and infer. In other words, it is a factor for you to  
13 consider.

14 The fact that certain witnesses were law-enforce-  
15 ment agents of the United States Government does not  
16 entitle their testimony to any greater weight or considera-  
17 tion than the testimony of -- than that accorded to the  
18 testimony of any other witnesses in the case. The  
19 credibility of Government agents is to be determined and  
20 judged by you just the same, and on the same basis as  
21 the credibility of any other witness. Government agents  
22 are not entitled to any more credence or any less credence  
23 than any other witness.

24 This just about concludes my charge. In con-  
25 clusion, if you fail to find beyond a reasonable doubt

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2 that the law has been violated, or if you fail to find  
3 beyond a reasonable doubt, that the defendant has committed  
4 the offense charged in the indictment, then you should not  
5 hesitate for any reason to find a verdict of acquittal as  
6 to such unproved charge.

7 On the other hand, if you find that the law has  
8 been violated and that the Government has proved such  
9 violation of the law by the defendant beyond a reasonable  
10 doubt, you should, of course, not hesitate, because of  
11 sympathy or any other reason, to render a verdict of  
12 "Guilty."

13 Upon your oath as jurors, you cannot allow a  
14 consideration of the punishment which may be inflicted  
15 upon a defendant if convicted, to influence your verdict  
16 in any way or in any sense to enter into your deliberations.

17 The duty of imposing sentence rests exclusively  
18 upon the Court. Your function is to weigh the evidence  
19 in the case and to determine the guilt or innocence of  
20 the defendant solely upon the basis of the evidence and  
21 the law.

22 When you proceed to your deliberations, have in  
23 mind that each one of you is entitled to your own sincere  
24 good judgment. At the same time, it is expected that you  
25 will exchange views with your fellow-jurors. This obviously



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2 is the essential purpose of jury deliberation, to discuss  
3 and consider the evidence together and listen to the  
4 arguments of your fellow-jurors.

5 Any verdict presented by you, whether "Guilty"  
6 or "Not guilty," must be the unanimous verdict of each  
7 one of you.

8 While the objective is to reach a verdict, if  
9 you can, and while you must be unanimous in rendering a  
10 verdict, each individual juror must cast his vote in good  
11 conscience, based on his judgment after considering the  
12 various points of view: his own and those of his colleagues.

13 Juror No. 1 will be your foreman unless she  
14 declines to act, and then you will elect another one of  
15 your members as foreman.

16 There will be one or two marshals outside of  
17 the jury room, and if you have any requests, any communica-  
18 tions to the Court of any kind, have your foreman make out  
19 a note and send it to me through the marshal.

20 You will have the indictment in the jury room.  
21 As far as the exhibits, they will not be sent to you  
22 automatically. We find that a better course is for you  
23 to request the exhibits you wish to have, and of course,  
24 upon such request, those exhibits will be forwarded to  
25 you -- sent to you immediately.

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2 In the event that you find that you cannot  
3 recollect something of the evidence, something of the charge,  
4 or you want a clarification of something in the charge,  
5 what do you do? Well, ultimately you can request such  
6 clarification from the Court, or you can request any part  
7 of the record to be read back to you. But before you do  
8 that, trade recollections, trade views, because sometimes  
9 one person will forget something and another person will  
10 remember it; and you must keep in mind that if you request  
11 something from the Court, a clarification or an elabora-  
12 tion on the charge, or a reading of the testimony, this is  
13 some hindrance and interference with your deliberations,  
14 so try to avoid that if you can.

15 When you are ready with a verdict, please send  
16 a note to the Court through the marshal, saying you are  
17 ready with the verdict. Please do not put the verdict  
18 in the note. The verdict should be announced by your  
19 foreman in open court: "Guilty" or "Not guilty."

20 I'll hold you in your places for a minute and  
21 see the lawyers to determine if there are any corrections  
22 or additions necessary for the charge, and then we will  
23 be back to you in just a minute.

24 (In the robing room.)

25 THE COURT: The Government?



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2 short, please.

3 MR. BLOCH: It's almost done, your Honor.

4 THE COURT: Bring it to a close.

5 Q Did you, in fact, purchase cocaine that day?

6 A Yes, I did.

7 Q I direct your attention to February 16th in the  
8 evening. Did you have any discussions with Freddie Pagan?

9 THE COURT: Look, what happened? Bring it to  
10 a close.

11 Q Was Freddie Pagan arrested on that day?

12 A Yes, he was.

13 Q Did you have any discussions with him at that  
14 time?

15 THE COURT: What happened to the case?

16 MR. FISCHER: Objection.

17 THE COURT: Sustained.

18 Get to the point. We are not trying another  
19 narcotics case.

20 Do you know what happened to the case?

21 THE WITNESS: Mr. Pagan was convicted of the  
22 sale and placed on five-years probation.

23 THE COURT: Was he convicted after a jury trial  
24 or guilty plea?

25 THE WITNESS: Mr. Pagan has several charges of